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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 431.

THE UNITED STATES, PETITIONER

vs.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B-W CONSTRUCTION CO., NOT INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1944
CERTIORARI GRANTED NOVEMBER 20, 1944

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Court of Claims of the United States

No. 44978

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B-W CONSTRUCTION CO., NOT INC.,

vs.

THE UNITED STATES OF AMERICA.

Petition

Filed October 20, 1939

To the Honorable, Chief Justice and Associate Justices of the United States Court of Claims:

Plaintiffs, Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, trading as B-W Construction Co., not Inc., respectfully represent:

1

Plaintiffs, Joseph H. Beuttas, John W. Beuttas and Paul H. Beuttas, trading as B-W Construction Co., not Inc., are residents of the State of Illinois and citizens of the United States,
2 having their principal place of business at 307 North Michigan Avenue, Chicago, Illinois; there has been no action upon this claim, other than as herein stated, in Congress or by any of the departments of the government; the plaintiffs are the sole owners of the claim herein presented; no assignment or transfer of said claim, or of any part thereof or interest therein has been made; plaintiffs are justly entitled to the amount herein claimed from the United States of America after allowing all just credits and off-sets; plaintiffs have at all times borne true allegiance to the government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government; and plaintiffs believe the facts as hereinafter stated to be true.

2

On or about November 26, 1935 the defendant, by its duly authorized agent, Horatio B. Hackett, Assistant Administrator for Federal Emergency Administrator of Public Works, entered into a written contract with the plaintiffs for the construction of the Foundations of the Jane Addams Houses, Project No. H-1405, in Chicago, Illinois, at the stated contract price of $104,890.00,

which sum was subject to adjustment in accordance with unit prices established in said contract and as further provided by said contract and the specifications, including the Addenda thereto. A true and correct copy of said contract is attached hereto, made a part hereof and marked "Exhibit A."

3

The plaintiffs fully and completely performed, in accordance with the provisions of said contract and the specifications, schedule and drawings forming a part thereof, all of the work required to be done thereunder which was duly accepted by the defendant. Whereupon, plaintiffs became entitled to the full amount of compensation fixed and agreed upon in and by said contract, as amended, to wit, $104,890.00, in addition, to further amounts hereinafter set forth.

4

That said contract of November 26, 1935, provided among other things that "the work shall be commenced upon receipt by the contractor of notice to proceed and shall be completed within seventy-five (75) calendar days after receipt by the contractor of such notice."

That on or about, to wit, the 15th day of November 1935, the defendant, by long-distance telephone call from Washington, D. C., to Chicago, Illinois, ordered the plaintiffs to have a power shovel on the job the following morning, and that on the following morning, that is, to wit, November 16, 1935, the plaintiffs did have a power shovel operating in the performance of said contract.

That thereafter, the plaintiffs received a letter from the
4 Federal Emergency Administration of Public Works, signed by C. A. Inham, District Manager, By Jas. H. Grier, Project Manager, dated on, to wit, November 21, 1935, reading as follows:

"In answer to your letter to me of November 19, 1935, relative to disposal of excavated material on Project H-1405, suggesting the removal of surplus excavation from the premises during excavation, I advise you that your letter concerning this subject has been referred to the Director of Housing in Washington for his decision, and I am in receipt of telegraphic instructions in answer.

"I am directed to advise you that 'specification terms with regard to stacking excavated material must be followed,' namely: that the material is to be stacked at site fourteen naught five (1405)."

"With this information at hand, please arrange to proceed with the work under your contract for Foundations for Jane Addams Houses Project H-1405, as outlined in the Plans and Specifications."

Pursuant to said notice plaintiffs made immediate preparations for commencement of work under the contract and were prepared to immediately commence and diligently prosecute their work under said contract on said date.

Thereafter, on, to wit, December 12, 1935, the defendant notified the plaintiffs to stop all work, as the defendant desired to make considerable changes in the plans and specifications, and did not permit the plaintiffs to continue with the performance of said contract until on, to wit, February 17, 1936, at which time the plaintiffs received a letter from the Federal Emergency Administration of Public Works dated February 12, 1936, signed by A. R. Clas, Director of Housing, and approved by Horatio B. Hackett, Asst. Administrator, reading as follows:

"With reference to your contract No. E. R. P. W. 110.171, dated November 26, 1935, covering demolition and foundation work at the above project, you are instructed to proceed at once with the work under this contract, as modified by the following revised drawings:

"FC-1 to FC-14, inclusive, dated November 20, 1935.

"An equitable adjustment of your contract price and time will be made as provided in the contract, and a formal Change Order issued, modifying your contract accordingly.

"This modification is ordered upon the express condition that it is subject generally to all the contract stipulations and covenants; that it is without prejudice to any and all rights of the United States of America under the contract and bond; and that you shall obtain the formal consent of your sureties to this modification."

During the period from December 12, 1935, to February 17, 1936, plaintiffs were required to and did remain on the job, and hold themselves in readiness to commence construction work at any time. Despite numerous and repeated requests by plaintiffs of defendant and its representatives for instructions and information as to the commencement of construction work, no definite information or instructions were received until, to wit, the 17th day of February 1936.

6 6

As a result of said delay in the commencement of the work, for which plaintiffs were not in any wise responsible, and which

was in violation of said contract and constituted a breach thereof by defendant, plaintiffs suffered severe loss and damage by reason of the necessity of maintaining its staff and equipment during the period from December 12, 1935, to February 17, 1936; increase of wage rates due to said delay; and increased cost of removal of certain earth due to frost penetration, at considerable additional expense and cost to plaintiffs, all to the loss and damage of plaintiffs in the sum of $20,000.00.

7

That on, to wit, the 25th day of June 1936 the defendant issued its Change Order No. 1, for which the defendant paid the plaintiffs the sum of $887.20; but, in arriving at said amount, failed to include therein the usual 10% for overhead and 10% for profit, amounting in all to the sum of $186.32, all to the loss and damage to the plaintiffs in the sum of $186.32.

8

That during the performance of said contract it became necessary for the plaintiffs to remove certain hidden obstructions within the foundation, the fair and reasonable value of the work necessary in order to remove said obstructions being the
7 sum of $523.36, but that the defendant refused to pay the said sum of $523.36, claiming that the fair and reasonable value thereof was only the sum of $368.08, all to the loss and damage of the plaintiffs in the sum of $155.28.

9

That the said contract provides, among other things, as follows (Article 19 (a)):

"The wage rates established in the specification shall be subject to change by the Federal Emergency Administration of Public Works. In the event that the Federal Emergency Administration of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract."

That subsequent to the execution of said contract on, to wit, January 8, 1936, the Federal Emergency Administration of Public Works did establish different wage rates by increasing the same, as a result of which the plaintiffs were compelled to pay said increased rates and thereby were put to increased cost to the extent of $6,396.00, notwithstanding which the contract price was not adjusted on the basis of actual labor costs to the plaintiffs, all to the loss and damage to plaintiffs in the sum of $6,396.00.

10

The plaintiffs performed said work under said contract, and said work was accepted by the defendant, acting through its
8 officers and agents authorized to accept the same, and the defendant received and has ever since enjoyed the benefit thereof at the expense of and damage to the plaintiffs. Plaintiffs aver that defendant is responsible for all of the expense and costs to which the plaintiffs were subjected, as hereinbefore set forth, whereby and by reason of which an obligation arose and still exists on the part of the defendant to pay plaintiffs just and reasonable compensation therefor. Plaintiffs, however, have not been paid on account of any expense and costs.

Wherefore, plaintiffs claim that they are justly entitled to recover the sum of $26,737.60 and, accordingly, pray judgment in their favor against the United States for said amount.

/s/ Joseph H. Beuttas
Joseph H. Beuttas
/s/ John W. Beauttas
John W. Beauttas
/s/ Paul H. Beauttas
Paul H. Beauttas

[*Duly sworn to by Joseph H. Beauttas et al., jurat omitted in printing.*]

9 /s/ William F. Kelly
William F. Kelly
/s/ P. J. J. Nicolaides
P. J. J. Nicolaides
Attorneys for Plaintiffs,
740-15th Street N. W.

10 *Exhibit "A" to petition*

ERPW 110 171
Contractor's Copy

Division I

United States Government Form of Contract

(Federal Emergency Administration of Public Works Projects)

FIXED PRICE CONTRACT

Housing Division, Form No. P. W. F. C. 2

Approved by the Federal Emergency Administrator of Public Works July , 1935.

HOUSING DIVISION,

HOUSING DIVISION,
(*Department*)

B-W CONSTRUCTION Co., Not Inc.
(*Contractor*)

CONTRACT FOR: Construction of Foundations, Jane Addams Houses, Project No. H-1405
AMOUNT: $104,890.
SITE OF THE WORK: Chicago, Illinois.
CONTRACT No.: ERPW 110.171

87909 Nov. 29 '35

Page 1 of Housing Division Form P. W. F. C. 2.

DIVISION I.

This contract, entered into this 26th day of November, 1935, by the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and B-W Construction Co., Not Inc., a partnership consisting of Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, trading as B-W Construction Co., Not Inc., of the city of Chicago in the State of Illinois hereinafter called the Contractor, witnesseth that the parties hereto do mutually agree as follows:

ART. 1. Statement of work: The Contractor shall furnish all labor and materials and perform all work required for the construction of the foundations of the Jane Addams Houses, Project No. H-1405, in Chicago, Illinois, for the consideration of the sum of One Hundred Four Thousand Eight Hundred Ninety Dollars ($104,890) which sum is subject to adjustment in accordance with unit prices established herein and as further provided by this contract and the Specifications, including the Addenda thereto, all in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification for construction of foundations for Jane Addams Houses, Project H-1405, Chicago, Illinois, including Addenda Nos. 1, 2, 3, and 4 thereto and Drawing No. F-1 to F-4 inclusive.

UNIT PRICES:

The following unit prices, representing the total unit cost to be charged to or credited by the Government are to be used for

changes ordered under this contract as specified under Alternates Nos. 1 and 2:

	Add	Deduct
Alternate No. 1:		
Additional services per week	$350	
Alternate No. 2:		
Nipples—each—complete in place:		
2 inch	1.25	$1.00
1½ inch	1.00	.75
1¼ inch	1.00	.75

(Construction of Foundations, Jane Addams Houses, Project No. H-1405.)

Page 2 (a) of Housing Division Form P. W. F. C. 2.

Division II

Sec. 47. Unit Prices—Foundation Work:

The following unit prices are hereby established for use as a basis for the adjustment of the contract price for changes in foundation work only. These units are estimated base costs and allowance for overhead and profit will be computed as set forth hereinafter:

Shovel Excavation	Per Cu. Yd. $0.60
Hand Excavation to 5'-0" Depth	" " " 2.00
" " below " " , Per ft. depth extra	" " " .45
Back Fill	" " " .45
Remove Surplus Earth from Site	" " " .50
Sheeting Bank	" Sq. Ft. .25
4" Foot Drains (including Fittings)	" Lin. Ft. .25
Reinforcing (Including Accessories)	" Ton 80.00
#8 Wire 6" x 6" Mesh	" Sq. Ft. .03
2,000 lb. Concrete	" Cu. Yd. 8.75
3,000 lb. "	" " " 9.40
1 . 5 . 7 "	" " " 8.10
13 Footing Forms	Per Sq. Ft. .14
Foundation Wall Forms (Incl. Pilasters)	" " " .16
Column Forms	" " " .18

Excavation prices are based on excavation being earth as defined in Sec. 5, Div. III "Excavating" of the specifications. For the computation of quantities involved in foundation changes ordered, the following general rules shall apply:

1. General excavation shall be assumed to be 2' 0" outside of wall lines.

2. Excavation for footings shall be assumed to be 6" outside of concrete lines.

3. Trenches for walls shall be assumed to be 2' 0" wider than the wall thickness but in no case less than 3' 0" in width.

4. The value of hand excavation shall be computed from the level at which hand excavation starts, and shall be generally considered as being 1' below the basement floor line, if any.

5. Form work quantities shall be based on contact area.
6. Concrete quantities shall be based on sizes shown on drawings.

Page 18 of General Conditions P. W. 43031.
(Construction of Foundations, Jane Addams Houses, Project No. H-1405.)
Page 2 (b) of Housing Division Form P. W. F. C. 2.

14 DIVISION II

7. Reinforcing steel unit prices are based on average conditions of sizes and bending and are for steel in place including all accessories.

8. Sheeting for hand excavation contemplates the cost of bank protection where required due to loose soil conditions and shall not be applied to superficial bank bracing, the cost of which is included in the excavation units.

SEC. 48. Unit Prices to be Submitted:

Basic unit prices covering any other classification of the contract work shall be submitted by the Contractor to the Contracting Officer within a reasonable time if requested by the Contracting Officer. These basic unit prices shall be the closest possible estimate of the actual cost of labor and materials required for the execution of the work involved. They shall be subject to the approval of the Contracting Officer and if so approved they shall be used as a basic cost for computing the adjustment to the contract price should changes in the plans and specifications be made as provided for in the contract.

SEC. 49. Contract Price Adjustment Due to Changes Ordered:

In the event that changes are ordered by the Contracting
15 Officer, as provided for in the contract, the contract price shall be adjusted, using as a basic cost the approved basic unit prices wherever applicable, or actual costs which are substantiated to the satisfaction of the Contracting Officer. In addition to the costs so determined the Contractor will be allowed overhead and profit for net additional work in accordance with the following policy:

1. Overhead and profit will be allowed on the net additional costs after deducting all credit items.

2. For changes resulting in a net additional cost up to $10,000:

a. On work performed by the Contractor: Cost plus 10% overhead plus 10% profit.

b. On work performed by a subcontractor: Cost to the Contractor plus a single 10% for overhead and profit, the cost to the Contractor being assumed as the net basic cost plus 10% plus 10%.

3. Any change that results in a net omission shall be credited to the Government at the actual cost without the addition of overhead and profit percentages.

4. The basic cost plus the above mentioned percentages allowed for overhead and profit shall be the entire cost to the Government for any change made under the contract.

Page 19 of General Conditions P. W. 43031
(Construction of Foundations, Jane Addams Houses, Project No. H-1405)
Page 2 (c) of Housing Division Form P. W. F. C. 2.

16 DIVISION II

5. Any change involving a net addition or deduction in excess of $10,000 will be adjusted by individual consideration.

These policies of the establishment of basic unit prices and contract price adjustment relate to changes which are ordered to be performed concurrently with the contract work and shall apply to normal and ordinary changes under the contract but shall not be applicable in those instances where, because of unusual circumstances or advancement of the work involved, an adjustment based on established unit prices would be unfair or inequitable, in the opinion of the Contracting Officer, to the Contractor or the Government.

Page 20 of General Conditions P. W. 43031
(Construction of Foundations, Jane Addams Houses, Project No. H-1405)
Page 2 (d) of Housing Division Form P. W. F. C. 2.

The work shall be commenced upon receipt by the Contractor of "Notice to Proceed" and shall be completed within seventy-five (75) calendar days after receipt by the Contractor of such notice.

ART. 2. Specifications and drawings: The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the
17 specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the Contracting Officer, without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise pro-

vided. Upon completion of the contract the work shall be delivered complete and undamaged.

ART. 2. Changes. The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this Contract, or

Page 2 of Housing Division Form No. P. W. F. C. 2

in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $600 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute
18 shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

ART. 4. Changed conditions: Should the Contractor encounter, or the Government discover during the process of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specification, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this Contract.

ART. 5. Extras: Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the Contracting Officer and the price stated in such order.

ART. 6. Inspection: (a) All material and workmanship (if not otherwise designated by the specifications) shall be sub-
61 ject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material furnished by the Contractor and workmanship or require its correction. Rejected

workmanship shall be satisfactorily corrected and rejected material furnished by the Contractor shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the same from the premises.

(b) The Contractor shall furnish promptly without additional charge all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The Contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the Contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work
20 is found to be defective in any material respect, due to fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the Contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

(e) Materials furnished by the Government shall be inspected by the Contractor as promptly after delivery thereof as possible and he shall, before incorporating the same in the work and in no event later than fifteen days after delivery, notify the Contracting Officer of any materials found by him to be defec-
21 tive or unsuited for the purpose for which intended. No

claim of the Contractor on account of any such material shall be allowed unless notice as above prescribed is given, except in such cases where a careful inspection by the Contractor could not disclose the nature of the defect. In the event the Contractor shall believe any such material to be defective or unsuited for the purpose intended he shall not use the same unless directed so to do by the Contracting Officer. Upon receipt of notification that any material is defective or unfit, the Contracting Officer shall inspect the same and if the same be in his opinion defective or unfit the Government will without cost to the Contractor furnish to him other and suitable material. Should the Contracting Officer find the material suitable for the purposes intended, he shall direct the Contractor to incorporate the same in the work. The Contractor shall not be liable, except for workmanship thereon,

Page 3 of Housing Division Form No. P. W. F. C. 2

for any materials furnished by the Government and incorporated in the work where he has notified the Contracting Officer within the time above provided that such materials are defective or unfit or where because of the nature of the defect the same could not be discovered by the Contractor by a careful inspection of the same.

ART. 7. (a) Materials and workmanship: Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or
22 articles are referred to in the specifications as "equal to" any particular standard, the Contracting Officer shall decide the question of equality. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their respective performance capacities and other pertinent information. When required by the specifications, or when called for by the Contracting officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The Contracting Officer may require the contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(b) Domestic materials: In the performance of this work the Contractor, subcontractors, material men, or supplies shall use

only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except as provided in the specifications.

23 ART. 8. (a) Superintendence by Contractor: The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

(b) The Contractor shall perform directly and without subcontracting not less than twenty-five per centum (25%) of the work, to be calculated on the basis of the contract price and the cost of materials, supplies, and equipment furnished by the Government.

ART. 9. Delays—Damages: If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the Contractor to proceed, the Contractor shall con-

24 tinue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers, and the Contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics,

quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the Contractor shall within 10 days from the beginning of any such delay notify the Contracting Officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fa[illegible] justify such an extension, and his findings of facts thereon sh[illegible] be final and conclusive on the parties thereto, subject only to appeal within 30 days by the Contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

25 ART. 10. Permits and care of work: The Contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

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ART. 11. (a) Convict labor: No person currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) Hours of labor: Except (1) in the case of emergency involving the public welfare or the protection of work already done, (2) special and unusual circumstances when the limitations below are not advisable or practicable, and (3) for supervisory and administrative employees the maximum hours of work for persons employed on the project shall be as follows:

(I) for manual labor, 8 hours per day and 130 hours per month;

(II) for clerical and other nonmanual employees, 8 hours per day and 40 hours per week.

(c) Eight-hour law: No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work

26 more than 8 hours in any 1 calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of $5 shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*,

That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321 and 324, relating to hours of labor.

ART. 12. Covenant against contingent fees: The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

ART. 13. Other contracts: The Government may award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed
27 by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ART. 14. Officials not to benefit: No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ART. 15. Disputes: All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed.

ART. 16. Payments to Contractors: (a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the Contracting Officer. In preparing estimates the material
28 delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and ac-

ceptance of all work covered by the contract: Provided, however, That the Contracting Officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the Contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

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(e) The Contracting Officer may withhold from the Contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed by the Contractor or any subcontractor on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

ART. 17. Additional security: Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the Contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

ART. 18. Wages: (a) There shall be paid each employee engaged on the project in the trade or occupations listed in the specification, the hourly, weekly, or monthly wage prescribed for the same in the Specification. If, after the award of this con-

tract it becomes necessary to employ any person in a trade or occupation not listed in the Specification, such person shall
30 be paid an hourly, weekly, or monthly rate or wage fairly comparable to the rates contained in the Specification as shall be approved by the head of the department, and such wage rates shall be retroactive to the time of the initial employment of such person in such trade or occupancy.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the Contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee, and shall furnish the Contracting Officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

ART. 19. (a) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administration of Public Works. In the event that the Federal Emergency Administration of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract.

31 (b) The Contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the third day following the payment of wages, a certified legible copy of each pay roll, whether paid by the Contractor or any subcontractor, shall be transmitted by the Contractor to such office as may be designated by the Works Progress Administration. The Contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project.

(c) The Contractor and each subcontractor shall report to the United States Department of Labor monthly within 5 days after the close of each calendar month, upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of per-

sons on their respective payrolls directly connected with the project, the aggregate amount of such pay rolls and man-hours work, and an itemized statement of the total expenditures for materials. The Contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

(d) The Works Progress Administration through its authorized agents shall have the right to inspect all work as it progresses and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract.

ART. 20. (a) Employment Service: With respect to all persons employed under this contract, except as otherwise provided in Regulation No. 2, issued by Executive Order No. 7060, dated June 5, 1935, (i) such persons shall be referred for assignment to such work by the United States Employment Service, (ii) preference in employment shall be given to persons from the public relief rolls; provided that persons not on public relief rolls may be employed on this project where qualified persons cannot be obtained from the public relief rolls, and provided further, that supervisory, administrative; and highly skilled workers on the project, as defined in the specification, need not be so referred by the United States Employment Service, provided all organized labor, skilled and unskilled, when organized labor is desired and requested by the Contractor, which is employed under this contract shall be supplied by the employment agencies designated by the United States Employment Service (or such other agency for the placement of workers as may be designated by the Federal Works Progress Administrator to act in lieu of the United States Employment Service) from the membership of recognized unions, with preference, first, to those members of such unions who constitute regular employees of the Contractor and who are on the local public relief rolls, second, to other members of such unions who are on the relief rolls, and, upon the exhaustion of union members

on such rolls, to any other members of the union. In the event, however, that qualified workers are not made available from the membership of the unions within 48 hours (Sundays and holidays excepted) after a request therefor is filed by the Contractor, and the employment agency has notified the unions of the receipt of such request, such labor may be chosen by the Contractor from other qualified workers, supplied by employment agencies designated by the United States Employment Service (or such other agency for the placement of workers as may be designated by the

Federal Works Progress Administrator to act in lieu of the United States Employment Service). The provisions of this paragraph are subject to the further requirement that all labor employed under this contract shall be taken from the county in which the project is located, to the extent that labor technically qualified to perform the work is available therein.

(b) Except as specifically otherwise provided in this Contract, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any ground whatsoever.

(c) The Contractor shall have the right, subject to disapproval of the Contracting Officer to dismiss any employee.

(d) Only one member of a family group may be em-
34 ployed on work under this Contract, except as specifically authorized by the Works Progress Administration.

ART. 21. Compensation insurance: The Contractor shall provide adequate workman's compensation insurance for all labor employed on the project who may come within the protection of such laws and shall provide, where practicable employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Contracting Officer shall be given.

ART. 22. Persons entitled to benefits of labor provisions: The Contractor will extend to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the Contractor and such laborer or mechanic, or between any subcontractor and such laborer or mechanic.

ART. 23. Inspection of records: The Federal Emergency Administration of Public Works and the Contracting Officer, through their respective authorized agents, shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract, and this data shall be made available at the Contractor's project office when requested.

ART. 24. (a) No person under the age of 16 years, and no
35 one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(b) Wages to be paid or for which reimbursement is to be made by the Federal Government may not be pledged or assigned,

and any purported pledge or assignment shall be null and void.

(c) This contract shall be subject to administrative orders of the Works Progress Administration which may issue from time to time relating to the administration and operation of regulations heretofore or hereafter issued pursuant to Executive order.

ART. 25. Termination for Breach: In the event any of the provisions of articles 7b, 8b, 11, 18 to 24, and 26 of this contract are violated by the Contractor or any subcontractor on the work, the Contracting Officer may terminate the contract by written notice to the Contractor. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby; and the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

36 ART. 26. Subcontractors: (a) The Contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting subcontractors, particularly articles 7b, 11, and 18 to 24.

(b) All bids submitted by contractors should state the wage rates established in the Specification pursuant to the provisions of article 18 hereof.

ART. 27. Accident prevention: The Contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, State, and municipal safety laws and building and construction codes. All machinery and equipment and other physical hazards shall be guarded in accordance with Manual of Accident Prevention in Construction of the Associated General Contractors of America unless such instructions are incompatible with Federal, State, or municipal laws or regulations. Nothing in this article shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the Contracting Officer.

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ART. 28. Definitions: (a) The term "Head of Department" as used herein, shall mean the Federal Emergency Administrator of Public Works, and "his representative" means any person authorized to act for him.

37 (b) The term "Contracting Officer" as used herein shall mean any person or persons duly authorized by the Fed-

eral Emergency Administrator of Public Works to have general direction of the work under the contract.

ART. 29. Employees' roster.—The Contractor shall maintain an up-to-date roster of all employees engaged on the project, showing their names, legal residences, and source of employment.

ART. 30. Signs.—Signs meeting the requirements of the Contracting Officer and bearing the legend "Public Works Administration—Federal Works Relief Projects No. " (Number to be as assigned for this project) shall be erected by the Contractor in appropriate places at the site of the project.

ART. 31. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

ART. 1. That part which is enclosed in parenthesis in the first, second, and third lines has been deleted.

See pages 2 (a), 2 (b), 2 (c), and 2 (d), which have been added hereto and made a part of this contract.

38 In witness whereof the parties hereto have executed this Contract as of the day and year first above written.

THE UNITED STATES OF AMERICA.
By (s) HORATIO B. HACKETT.
Assistant Administrator for Federal Emergency Administrator of Public Works.
(Official title)

B-W CONSTRUCTION CO., Not Inc.
Contractor, 307 N. Michigan Ave., Chicago, Illinois.
By (s) JOSEPH H. BEUTTAS
Joseph H. Beuttas
By (s) JOHN W. BEUTTAS
John W. Beuttas
By (s) PAUL H. BEUTTAS
Paul H. Beuttas

Two witnesses:
(s) B. V. INSKEEP.
(s) RUSSELL MANSFIELD.

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39 *General traverse—Filed by leave of Court November 29, 1939.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(Sgd.) FRANCIS M. SHEA.
Assistant Attorney General.

H.F.

Argument and submission of case

October 17, 1945. The argument of the case on the merits began. Argued by Mr. P. J. J. Nicolaides for plaintiff.

October 8, 1943. Argument of case concluded by Mr. P. J. J. Nicolaides for plaintiff. Argued by Mr. D. B. MacGuiness for the defendant, and the case submitted on the merits.

41 Special findings of fact, conclusion of law, and opinion of the Court by Whitaker, J.; Whaley, Chief Justice, concurs.

Concurring opinion by Madden, J.

Opinion, dissenting in part, by Littleton, J.

Mr. P. J. J. Nicolaides for plaintiffs. Mr. William F. Kelley was on the brief.

Mr. Donald B. MacGuineas, with whom was Mr. Assistant Attorney General Francis M. Shea, for defendant.

This case having been heard by the Court of Claims, the court, upon a stipulation entered into between the parties hereto, the evidence, and the report of a commissioner, makes the following:

Special findings of fact

1. The plaintiffs, Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, trading as B-W Construction Company, not incorporated, are citizens of the United States engaged in the building-construction business, and maintain their office in the city of Chicago, Illinois.

2. The plaintiffs entered into a contract with the defendant November 26, 1935, signed by Horatio B. Hackett as Assistant Administrator for Federal Emergency Administrator of Public Works, whereby, for the consideration of $104,896, plaintiffs undertook to furnish all labor and materials and perform all work required for Project No. H-1405, in Chicago, Ill., consisting of the construction of the foundations of the Jane Addams Houses.

42 The work was to be commenced upon receipt by the contractors of notice to proceed and be completed within 75 calendar days after receipt of notice.

3. Article 28 of the contract provided:

"(a) The term 'Head of Department' as used herein shall mean the Federal Emergency Administrator of Public Works, and 'his representative' means any person authorized to act for him.

"(b) The term 'Contracting Officer' as used herein shall mean any person or persons duly authorized by the Federal Emergency

Administrator of Public Works to have general direction of the work under the contract."

4. Article 3 of the contract provided:

"The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (6) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under the Contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed."

Article 15, thus referred to, provided:

"All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the
43 department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed."

5. Paragraph 1 of Section 12 of Division I of the specifications provided that "Subject to the specification, general conditions, and the contract, there shall be paid each Employee in the Trade or Occupation listed below not less than the hourly wage rate set opposite same. * * *"

Carpenters	$1.3125
Cement finishers	1.3125
Hoisting engineers	1.3125
Common laborers	0.825

Paragraph 2 of Section 12, supra, provided that "The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract."

Paragraph 4 of Section 12 also provided as follows:

"The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

Articles 18 (a) and 19 (a) of the contract, omitting irrelevant portions, provided as follows:

"(Art. 18) There shall be paid each employee engaged on the project in the trade or occupations listed in the Specifications, the hourly, weekly, or monthly wage prescribed for the same in the Specification. * * *

"(Art. 19) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administrator of Public Works. In the event that the Federal Emergency Administrator of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract."

* * * * * *

The specifications were by Article 1 of the contract made a part thereof.

44 6. The work called for by the contract with plaintiffs was confined to the substructures or foundations of the buildings to be erected by defendant.

7. On November 15, 1935, before the contract had been executed by defendant, plaintiffs received a telephone call from a representative of the defendant in Washington, D. C., by the name of Small, to have a steam shovel on the project the following morning. Plaintiffs complied and placed the steam shovel on the project the next morning, after having let a subcontract for the steam shovel, as plaintiffs had planned, for the excavation work. This direction was given to plaintiffs for publicity purposes. The shovel brought on the work by plaintiffs excavated only four or five cubic yards of earth on November 16. It does not appear from the record whether or not the direction given to plaintiffs by Small to have a steam shovel on the project on the morning of the 16th was given by direction of the Director of Housing or the Assistant Administrator of Public Works, as the authorized representative of the head of the department. After plaintiffs had excavated a few cubic yards of material with the steam shovel, as above stated, defendant's project manager at the site told plaintiffs to do no other work.

8. On November 21, 1935, the District Manager of the Housing Division of Public Works Administration at Chicago wrote plain-

tiffs a letter, in reply to their letter of November 19, 1935, with reference to the disposal of excavated material on the project and concluded said letter to plaintiffs with the statement that "With this information at hand, please arrange to proceed with the work under your contract for Foundations for Jane Addams Houses Project H-1405, as outlined in the Plans and Specifications." Plaintiffs proceeded with the work in accordance with this direction of November 21, confining their work at that time to preparatory work, such as organizing personnel, surveying, and subletting contracts for materials and services. There were some structures on the site which plaintiffs' contract required them to remove.

9. On December 9, 1935, A. R. Clas, Director of Housing, directed plaintiffs by telegram to proceed with the work.

45 At noon the next day, December 10, 1935, the contracting officer, due to changes that were being made by him, ordered plaintiffs to suspend all work until further notice. The changes made by the contracting officer consisted of raising the footings of the foundations about two feet and certain other changes which related to the boiler room and coal storage room. The changes in the boiler and coal storage rooms referred to had been decided upon, and revised drawings dated November 20, 1935, with reference thereto had been made and sent to the project manager at the site prior to December 10, 1935, but the work by plaintiffs was suspended and held up by the contracting officer until February 17, 1936, solely for the purpose of consideration by him of the amount by which the contract price should be reduced by reason of the changes shown on said revised drawings of November 20, 1935. This delay of 69 days was unreasonable. There was no provision in the contract which authorized the Government to suspend the work.

On February 12, 1936, the contracting officer advised plaintiffs that—

"* * *, you are instructed to proceed at once with the work under this contract, as modified by the following revised drawings:

"FC-1 to FC-14, inclusive, dated November 20, 1935.

"An equitable adjustment of your contract price and time will be made, as provided in the contract, and a formal Change Order issued modifying your contract accordingly."

Plaintiffs received this order to proceed on February 17, 1936, and in their letter to the contracting officer, acknowledging receipt thereof, they advised him as follows:

"We wish to inform you that, due to this delay beyond our control, we have been subjected to expenses of superintendent, watchmen and paymaster wages, insurance, miscellaneous job costs, government office maintenance, estimating and traveling costs, waiting

time of excavating equipment, and certain expenses of our Chicago office.

"The totals of the above-listed expenses we shall forward to you in due time for your approval."

The contracting officer replied to this February 25, 1936, saying:

46 "As stated in the Proceed Orders issued to you, equitable adjustment of your contract price and time, due to the changes ordered, will be made. Careful consideration will be given to claims presented by you in connection with them."

Due to weather conditions plaintiffs were unable to proceed with the work after receipt February 17, 1936, of the order to proceed, until February 26, 1936, and on February 27, 1936, plaintiffs requested of the contracting officer extension of time "up to February 28, 1936," and repeated their request for additional compensation. Extensions of time were allowed.

Plaintiffs proceeded with the work, as directed, and eventually completed it.

10. Subsequent to the proceed order of February 12, 1936, the contracting officer issued Change Order No. 1 April 17, 1936, under Art. 3 of the contract in which he decreased the contract price in the amount of $9,656.36, based upon the revised drawings of November 20, 1935. Plaintiffs made written protests to the contracting officer in which they renewed their claims for extra costs and expenses as a part of the equitable adjustment to be made under Art. 3 during the period December 10, 1935, to February 17, 1936, when work was suspended because of and in connection with the change under Art. 3. The contracting officer refused to make any adjustments in the change order and on April 22, 1936, advised plaintiffs as follows:

"* * *. Change Order No. 1 is issued without prejudice to your numerous claims which you filed in connection with the authorized revisions. I have previously informed you that although it is my intention to recommend reimbursement for some of these claims, it will be necessary to submit them to the Comptroller General. All of these claims will be presented for his decision at the same time, and as a result it is necessary that you submit itemized substantiation covering those which have been presented in general form only."

Plaintiffs appealed to the head of the department under Art. 15 of the contract.

Subsequently the contracting officer made some other changes for which he issued change orders, from which plaintiffs also
47 timely appealed to the head of the department. However, there was no suspension of the work or delay in connection

with any of the change orders other than Change Order No. 1 of April 17, 1936.

11. The items of the claim made in the petition herein by plaintiffs are as follows:

(1) Maintenance of staff and equipment December 12, 1935, to February 17, 1936; increase of wage rates due to delay for that period; increased cost of removal of earth due to frost penetration	$20,000.00
(2) Failure to include overhead and profit in Change Order No. 1	186.32
(3) Allowance of less than fair and reasonable compensation for removing hidden obstructions	155.28
(4) Increased wages	6,396.00
	26,737.60

The parties herein stipulate and agree by written stipulation signed by counsel for plaintiffs and by the Assistant Attorney General that plaintiffs are entitled to recover the sum of $8,727.44, and only that amount, in connection with all their claims against the defendant presented by this suit, other than their claim based on the wage increases which took place during the course of performance of the contract in question. Defendant consents to entry of a judgment in the amount of $8,727.44 and plaintiffs accept said amount as full compensation for all the said claims, other than that based on the wage increases, item 4 above, amounting to $6,396.

12. On December 28, 1935, plaintiffs received a report from their superintendent on the project based on information obtained by him that the Federal Emergency Administration of Public Works was about to change the scale of wages for carpenters and laborers on P. W. A. projects. At that time the Government had not issued invitation for bids and specifications for the project covering the superstructures of the Jane Addams Houses, the foundations of which were covered by plaintiffs' contract. The Government specifications and invitation for bids for such superstructures were issued February 15, 1936, and set forth the scale of wages, applicable to the superstructures, of certain wage earners, among others, as follows:

	Rates per hour
Carpenters	$1.50
Cement finishers	1.50
Hoisting engineers	1.50
Common laborers	.95

At the commencement of their work plaintiffs began paying the rate of wages set forth in this contract for the foundations (see finding 5) and continued to pay such wages until sometime in February or March of 1936. Defendant did not at any time expressly request plaintiffs to pay higher wages. Plaintiffs' force was unionized and, because plaintiffs were not paying the wage scale pro-

vided in the invitation and specifications for the superstructures, which were not a part of plaintiffs' contract, the Union called a strike and thereby enforced the payment by plaintiffs of the wage scale provided for the project for the superstructures. The Union demanded payment of back wages on the increased scale, retroactive to January 8, 1936, and plaintiffs acceded to the demand.

13. The scale of wages announced in the invitation for bids and specifications for the superstructures was higher than the scale prevailing in the territory at that time on private jobs. The Government did not participate in negotiations between plaintiffs and the striking workmen.

The difference paid by the plaintiffs between the two scales, that on the foundations and that on the superstructures, amounts to $4,321. With added workmen's compensation and social security, the sum of $4,321 is increased to $4,660.83.

14. A dispute arose between the parties to the contract in suit as to reimbursement by defendant to plaintiffs for the additional wages they paid over and above those set forth in the invitation for bids and the contract, the plaintiffs contending that defendant had established higher wages on the project and that they were also entitled to be reimbursed such increase as an added cost due to changes made by defendant in the foundations and consequent suspension and postponement of the work to the time when defendant's higher scale of wages for the superstructures was announced.

The final Change Order No. 1 (first issued by the Director of Housing April 17, 1936), covering the foundations was revised and reissued by the Assistant Administrator on June 25,
49 1936, after plaintiffs' work had been substantially completed, and such change order did not include the wage increases in dispute, but reserved to plaintiffs their right to prosecute their claim, then pending, to such increase. This change order of June 25, 1936, decreased the contract price, as a result of the changes shown on the revised drawings dated November 20, 1935, by $4,721.94, instead of $9,656.36, as first decided by the contracting officer.

15. At the time the contracting officer issued the formal change order of April 17, 1936, as above-mentioned, he advised plaintiffs that he would not allow therein, as a part of the equitable adjustment under Art. 3 of the contract, the actual costs and expenses incurred by plaintiffs in connection with the changes made in the revised drawings, or the increased wages, due to the stoppage and suspension of the work, but that a determination with respect to such items of extra costs and expenses would be made and a recommendation with respect thereto transmitted to the General

Accounting Office for action. Plaintiffs asserted that all their claims for extra costs and expenses were directly attributable to the stoppage and suspension of work in connection with and due to the change and made claim therefor as a part of the equitable adjustment to which they insisted they were entitled under the provisions of Art. 3 of the contract.

On June 29, 1936, the Assistant Administrator of Public Works made written decisions and findings of fact with reference to the various items of the claim asserted by plaintiffs on appeal. His findings and decision with reference to Item 3 of plaintiffs' claim, as a part of the equitable adjustment to which they insisted they were entitled, in the amount of $8,743.42 for extra costs resulting from the stop order and delay due to the change in connection with the revised drawings, were typical of all other findings made by him in connection with such items. In this connection he advised plaintiffs as follows:

"I have reviewed the various claims presented by you involving appeals from decisions made by the Director of Housing as contracting Officer with reference to your contract. * * *.

50 I am listing below the items of your claims, together with my finding with reference thereto: * * *

"Item No. 3

"Contractor's Claim for Damages in the Amount of $8,743.42 Resulting From Delay Caused by Revised Drawing and Stop Order

"This claim includes such items as superintendent's time, watchmen's time, paymasters' time, power shovel waiting time, including watchmen, miscellaneous job expenses and prorated Chicago office expenses. I find that this claim is occasioned by the stopping of work by the Government on December 12, 1935, from which time until February 17, 1936, the job was shut down. I further find that the inability of the contractor to perform any work during this period was occasioned by the direct orders of the Government and was without fault or negligence on the part of the contractor. I further find that as a result of this delay the contractor was occasioned expenses over and above those figured in computing the credits allowed under Change Order No. 1 above referred to and which, but for the stopping of the work by the Government, would not have been occasioned, in the amount of $4,085.58. Attached and marked Exhibit "B" is a detailed statement of such expenses. The matter of the payment of any amount because of additional expenditures involved must be submitted to the General Accounting Office for its ruling as

to whether or not any of the items submitted in your claim for $8,723.42 are properly payable by the Government. Your claim, together with my findings as above noted, will be transmitted to the General Accounting Office at the time the final voucher is submitted for payment, and that office will make final settlement."

16. In the same decision and findings of June 29, 1936, the Assistant Administrator made findings of fact and decisions with reference to the claim of plaintiffs for wage increases above the minimum wage rates set forth in the specifications of their contract, which findings and decision were transmitted to plaintiffs as follows:

"Item No. 6—Wage Increase in the Amount of $6,936 Over and Above Minimum Wage Rate Specified

"I find that the increase in wage rates was occasioned by
51 no fault of the Government, that the Contract placed upon the contractor the obligation of securing workers for the project, and that except as directly authorized by the Government no allowance would be made for increased wage rates. Accordingly, the claim in the amount of $6,936 must, therefore, be disallowed.

"Intem No. 7—Wage Increase in the Amount of $3,467 Over and Above Minimum Wage Rates Specified, Resulting From Delay Due to Revision of Drawing and Stop Order

"This claim arises because of the fact that from the 12th day of December 1935, at which time work was stopped, up to January 8, 1936, the wage rates in effect were lower than those prevailing after January 8, 1936. I find that, had the contractor been permitted to work during the period from December 12 to January 8, he could have obtained workers at the lower rate prevailing up to such date; and because of the delay the work which would otherwise have been performed during the time of the lower pay rate had to be performed after the new wage rate went into effect. I find that because of this delay the contractor was put to an additional expense of $909, which includes 10 percent for overhead and 10 percent for profit. The payment of this item is dependent upon the opinion of the General Accounting Office and will be submitted to it in the same manner as the claims listed under Item No. 3 [i. e., for settlement]."

17. Following the above-mentioned findings and conclusions, the contracting officer proceeded with the matters of final acceptance of the work which had theretofore been completed by plaintiffs, the preparation of the final voucher under the contract, and

the securing of releases from plaintiffs and their surety for the purpose of making final settlement. During this time, and before the final voucher was prepared, plaintiffs on February 12, 1937, in a letter of that date addressed to the Federal Emergency Administrator of Public Works, the head of the department, petitioned him to make a decision on the various items of the claim which had been considered by the Director of Housing and by the Assistant Administrator, as his authorized representative, and to allow such items of the claim as a part of the equitable adjustment under the contract and to include them in the voucher for final payment under the contract.

52 Plaintiffs on March 29, 1937, executed a voucher as the final voucher under the contract for $24,048.25 as the claimed "balance due on contract and changes." To this voucher was attached a release signed by plaintiffs and their surety specifically reserving their rights with respect to seven items in stated amounts totaling $23,548.31, one of which, in the amount of $1,725.20, had been allowed for payment by the Assistant Administrator.

18. On May 20, 1937, Harold L. Ickes, Federal Emergency Administrator of Public Works, after considering plaintiffs' appeal to him, as above-mentioned, made findings of fact, conclusions, and recommendations on the various items of plaintiffs' claim in a letter addressed to the Comptroller General, and accompanied by the final voucher above mentioned. With respect to the claim made by plaintiffs for reimbursement under the contract for increased wages, Mr. Ickes stated in this letter to the Comptroller General as follows:

"Reference is made to the Contractor's claim in the total amount of $10,403 for wage increases over and above the minimum wage rates specified. This claim may be divided into two parts; one for $6,936, resulting, according to the Contractor, from fundamental changes in economic conditions, and the other for $3,467, resulting, according to the Contractor, from the issuance of the specification for superstructure work on this project, which specification established wage rates different from those set up in the foundation specification and different from those applicable at the time of issuance of the aforementioned stop order. I find, after checking the certified pay rolls in connection with the entire project from its inception on December 12, 1935, up to and including its completion of final pay roll on May 19, 1936, that the B-W Construction Company did actually pay a total of $4,259.12 in excess of the minimum rates specified to the laborers and mechanics employed directly at the project site. I find also that the N. Cullen Company, a Subcontractor, actually paid $61.88

in excess of the minimum rates specified. By totaling the increase in wages over and above the minimum rates specified, as indicated above, it is noted that the Contractor and the Subcontractor did pay $4,321 more than the minimum wages required by the contract. The Contractor in arriving at his total of $10,403 used a percentage basis rather than the actual excess wages paid over those specified.

I find that there were no fundamental changes in economic
53 conditions as contemplated by Article 19 (a), as amended, of the contract, and I recommend that the claim for $6,936 be disallowed. As to the Contractor's claim for $3,467, you are informed that the labor rates specified in the contract are minimum rates only. I understand that the minimum rates specified are in accordance with those set forth in an agreement entered into between the Building Trade Employers' Association and the Unions of the City of Chicago. I do not have at my disposal a copy of this agreement, which I understand established the rate contractors were to pay as wages up to and including January 1, 1936. I understand that the Contractor is a member of this Association and had in his possession a copy of the agreement with the Unions prior to the time of his bidding. The Government had no way of knowing what minimum rates would be established after January 1, 1936, as the Unions and the Building Trade Employers' Association had not established the rates for the year 1936 at the time the foundation work was bid upon. Consequently, the Contractor should have been guided by the Unions' agreement, and it is my opinion that it was his obligation to provide, in his bid, against any possible increase in wages over and above the minimum specified, due to the fact that the Government did not specify the maximum rate. Moreover, Division I, page 6, paragraph 4, Section 13 [12] of the Specification, states:

"The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

"I am of the opinion that this claim should be disallowed in its entirety, as I find that the acts of the Government, in advertising for the superstructure contract and in establishing rates for that contract on February 15, 1936, did not increase the wage rates that the Contractor was obligated to pay, and that wages were increased because of the expiration on January 1, 1936, of the agreement with the Unions, and the signing of a new agreement. Furthermore, I am of the opinion that the Contractors in the City of Chicago were advised by the Unions that on January 1,

1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936.

54 "I find that the issuance on December 12, 1935, of the aforementioned stop order, prevented the Contractor from proceeding with the work until a proceed order was issued on February 17, 1936. The expenses incurred by the Contractor, due to this act of the Government prohibiting him from starting with his work on December 12, which would have allowed him to pay the prevailing rates for wages as of that date, namely, 82½¢ per hour for laborers and $1.31¼ for carpenters, up to and including January 8, 1936, which is the date upon which the Contractor started to pay a higher rate, namely 95¢ per hour for laborers and $1.50 per hour for carpenters, is a fair and just charge against the Government. Therefore, I recommend that the Contractor be reimbursed for the increase of wages he paid to laborers at the rate of 12½¢ per hour and the increase of wages he paid carpenters at the rate of 18¾¢ per hour for the total hours of laborers employed and the total hours of carpenters employed in the 26 days following the date of Proceed Order, namely, February 17, 1936. The manner in which I arrive at this 26 days is by using the Stop Order date of December 12, up to and including January 8, which is the date the higher wages went into effect, as the amount of days, the Contractor would have been able to employ men at the lower wages. The total number of labor hours in the first 26 days after February 17 (which in reality was February 24 due to the fact the Contractor could not proceed on account of weather conditions) indicated on the Contractor's and his Subcontractor's certified pay rolls as having been paid on the increased wage basis, namely, 95¢ per hour, is 983½ hours, and when extended at the rate of 12½¢ per hour equals $122.94. The total number of carpenters' hours in the first 26 days after February 17, 1936 (which in reality begins on March 16, 1936, due to the fact that the carpenters were on strike), as indicated in the certified pay rolls, is 3,351 hours, and when extended at the rate of 18¾¢ per hour is $628.31, making a total increase for laborers and carpenters of $751.25 and I recommend that the Contractor be paid 10 percent overhead and 10 percent profit, which is in accordance with the specifications when an extra is involved, which makes a total of $909.00, and my finding is that this amount is chargeable to the cost of arriving at the settlement between the original contract plans and the revised plans and is an item of damages against the Government. * * *

"There is enclosed a voucher in the amount of $24,048.25, which amount includes all of the Contractor's claims
55 enumerated and commented on herein. Also enclosed are

the Certificate of Completion and the Certificate and Release relating to this contract.

"The Contractor has refused to execute separate vouchers, one for the final payment under the contract as adjusted, in the amount of $2,225.06 and one for the amount of his claims, namely, $21,823.19. Therefore, of the total amount of the voucher enclosed I hereby certify that $2,225.06 is due the Contractor as final payment under the contract as adjusted.

"The balance of the enclosed voucher in the amount of $21,823.19 is referred to you for direct settlement without my certification, but it is my recommendation that, in addition to the amount I have certified as being due under the contract, the Contractor be reimbursed for the individual items recommended in settlement of this claim."

19. The statement made in the above-quoted letter that the labor rates of wages provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated January 1, 1936, and that thereafter higher rates were to be established, was an error. The agreement between the Building Trade Employers' Association and the Unions fixing rates of wages did not expire until May 31, 1936.

20. The Comptroller General upon receipt of the final voucher executed by plaintiffs and the letter and recommendations of Administrator Harold L. Ickes refused to authorize payment under the contract of any of the controverted items of plaintiffs' claim, but approved the voucher for the amount of $2,225.06 as the amount otherwise due under the contract, as certified by the head of the department, and issued a certificate of settlement accordingly on February 7, 1938.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover $13,388.27.

It is therefore adjudged and ordered that plaintiffs recover of and from the United States the sum of thirteen thousand three hundred eighty-eight dollars and twenty-seven cents ($13,388.27).

56

Opinion

WHITAKER, Judge, delivered the opinion of the court:

Plaintiffs sue to recover extra costs incurred due to a suspension of the work for 69 days during which a change in the plans and specifications was being considered. It is stipulated that they are entitled to recover $8,727.44 on this account.

They also sue to recover for increased wages which they were required to pay common laborers, carpenters, cement finishers, and hoisting engineers.

Plaintiffs had a contract for the construction of the foundations of the Jane Addams Houses in Chicago. It was a relief project; it was intended to relieve unemployment, to provide a living wage for laborers and so to increase their purchasing power. What a living wage was, was fixed by the contract. The contractor was required to pay a minimum wage for common laborers of 82½ cents an hour, and for carpenters, cement finishers, and hoisting engineers of $1.31¼ an hour. It was recognized, however, that the cost of living might increase during the progress of the work or for some other reason that the Government might find it desirable that even higher wages should be paid, and so it was provided in article 19 of the specifications that if the Federal Emergency Administrator of Public Works "establishes different wage rates, the contract price shall be adjusted accordingly. * * *"

The contract was entered into on November 26, 1935, but defendant held up the work until February 17, 1936, when it gave plaintiffs notice to start work; however, work was not begun until February 28, 1936, due to bad weather. While the work was under suspension the defendant on February 15, 1936, asked for bids on the construction of the building above the foundation. (Plaintiffs' contract was for the foundation only.) This advertisement for bids required bidders to pay a minimum wage to the before-mentioned laborers higher than was provided for in plaintiffs' contract. A successful bidder on this part of the building could not pay common laborers less than 95 cents an hour, instead of the 82½ cents on the foundation contract, and could not pay carpenters, cement finishers, and hoisting engineers less than $1.50 per hour, instead of the minimum of $1.31¼ on the foundation contract.

Whereas on November 26, 1935, the Government thought not less than $1.31¼ was a fair wage for carpenters, cement finishers, and hoisting engineers, and 82½ cents for common laborers, by February 15, 1936, conditions had changed to such an extent that it no longer considered these fair wages and demanded of the superstructure contractor the payment of higher wages.

Plaintiffs' work did not commence until after this change in the wage rate. So, when they offered to pay their carpenters, cement finishers, and hoisting engineers $1.31¼ and common laborers 82½ cents, these men very naturally said, no, the Government has said that no less than $1.50 and 95 cents is fair; and

when plaintiff would pay no more, they struck. In order to induce them to work plaintiffs had to pay the $1.50 and 95 cents.

All the proof goes to show the laborers would not have struck except for the Government's action in establishing a higher minimum wage on the very same building on which plaintiff's laborers were employed.

That they should have struck was well-nigh inevitable. They had no contract with plaintiffs to work at any fixed wage and so, when their Government said that the least that ought to be paid for such labor was more than the plaintiffs offered, of course they demanded the amount fixed by the Government as fair and refused to work for less.

So, while the defendant did not expressly demand of these plaintiffs that they pay a higher minimum wage on their contract, it nevertheless brought about conditions that made this almost inevitable, and it must have known that this would be the necessary consequence of its act. Just as effectively as though it had directly ordered plaintiffs to pay a higher wage, it indirectly required them to do so.

In LeVeque, et al. v. United States, 96 C. Cls. 250, we held that the establishment by the Government of higher wages on another project in another part of the city did not require it to pay plaintiffs the increased wages they had to pay on their project. In that case we concluded the increase in wages paid by plain-
58 tiffs was not a necessary result of defendant's act. Here we think it was. The increased wages in this case were on the very same building on which plaintiffs were working. The Administrator did not directly establish different minimum rates to be paid by plaintiffs, but this was the necessary consequence of what he did. He did indirectly that which if done directly would have rendered the Government liable. We are of opinion that the defendant in fact established different wage rates on plaintiffs' job, and, therefore, it is obligated to pay the increase under article 19.

But whether or not this is so, it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. Restatement of the Law of Contracts, sec. 315 (1); Williston on Contracts, sec. 1293 A; Anvil Mining Co. v. Humble, 153 U. S. 540, 551. It was an implied condition of this contract that the Government would not do any act that as a necessary consequence would make performance by the plaintiffs more expensive. The Government breached that implied condition by increasing the minimum wage to be paid on a part of this build-

ing, which as a necessary consequence required plaintiffs to pay more wages than those specified.

It follows that the defendant is liable for the increased wages plaintiffs had to pay.

It is said, however, that the contracting officer and head of the department have decided that the Government has fully performed its obligations under the contract, and that this decision is final under article 15 of the contract and that, therefore, this court has no jurisdiction to determine the matter.

The defendant's position, otherwise stated, is that the parties agreed in advance of the dispute to waive their right to sue for this breach of the contract and to leave the final determination of the controversy to the decision of one of the contracting parties.

We do not think the parties intended article 15 to have such broad scope. If they did, it is clearly illegal under numerous decisions of the Supreme Court of the United States and of other Federal courts and of the State courts. It has long
59 been settled that any agreement made in advance of the controversy which deprives a party of recourse to the courts is contrary to public policy and, therefore, void. Insurance Co. v. Morse, 20 Wall. 445, 450, et seq.; Doyle v. Continental Ins. Co., 94 U. S. 535, 537; Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, 142; Martin v. B. & O. R. R., 151 U. S. 673, 684; Terral v. Burke Construction Co., 257 U. S. 529. See also cases cited in 13 Corpus Juris, p. 455, notes 3, 5 and 8; 17 Corpus Juris Secundum p. 603, notes 58, 66.

In Insurance Co. v. Morse, supra, there was involved a statute of Wisconsin which imposed on foreign insurance companies, as a condition to doing business in the State, an agreement to submit to the exclusive jurisdiction of the Wisconsin courts and to forego removal of a case to the Federal courts. It was held that the statute was unconstitutional and void, because "a man may not barter away his life or his freedom, or his substantial rights."

The statement of this principle was somewhat amplified in Doyle v. Continental Ins. Co., supra, in commenting on the Morse decision. It was there said, on page 538:

"It was held, first, upon the general principles of law, that although an individual may lawfully omit to exercise his right to transfer a particular case from the State courts to the Federal courts, and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws

and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights."

The majority of the court, however, held that while a State could not impose this condition on an insurance company's entering into business, it nevertheless had the right to revoke its license, even though a breach of the condition may have been the reason for the revocation. Justices Bradley, Swayne, and Miller dissented on the ground that the same reason that prevented the imposition of such a condition prevented the revocation of the license for its breach. Both the majority and minority
60 agreed, however, that a condition in a contract prohibiting resort to a tribunal otherwise having jurisdiction of the subject matter and the parties was illegal.

Fifty years later this view was approved by the Supreme Court in the case of Terral v. Burke Construction Co., 257 U. S. 529, and we understand it to be the law today. Section 558 of Restatement of the Law of Contracts reads:

"A bargain to forego a privilege that otherwise would exist to litigate in a Federal Court rather than in a State Court, or in a State Court rather than a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action or the time within which a possible future claim may be asserted, is illegal."

It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications, whether or not the work of materials comply with the specifications, the measurement of the work done, causes and extent of delay, and similar matters of fact (e. g., see Kihlberg v. United States, 97 U. S. 398; Sweeney v. United States, 109 U. S. 618; Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549; United States v. Gleason, 175 U. S. 588; Ripley v. United States, 223 U. S. 695; Plumley v. United States, 226 U. S. 545; United States v. Mason & Hanger Co., 260 U. S. 323); but provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and preventing resort to the courts for a determination of that question and for enforcement of rights thereby accruing have never been upheld. For instance, in Guaranty Trust Co. v. Green Cove R. R., supra, a provision of a trust deed agreeing not to resort to the courts for its enforcement was held invalid on the authority of a number of English and State cases there cited.

Even arbitration agreements not authorized by statute, leaving to arbitrators the final determination of whether or not there has been a breach of the contract, are illegal, but parties may legally agree on arbitration to determine facts upon which a duty

61 depends. See Restatement of the Law of Contracts, secs. 550 and 551; Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 120–121.

Here the agreement, as construed by the defendant, is to leave the settlement of the dispute not to arbitrators but to an agent of one of the parties. It is an agreement to leave to the party who made the contract the determination of whether or not it had breached it.

If Article 15 is to be given such a broad scope, then an aggrieved contractor is denied access to this court save only in those cases where the decision of the contracting officer on whether or not he has breached his contract is arbitrary or capricious or so grossly erroneous as to imply bad faith. Such an agreement would be contrary to the Act of Congress giving its consent that the United States might be sued. On February 24, 1855, Congress passed an Act creating the Court of Claims and said, "*the said court* shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States, * * *". [Italics supplied.] This provision is the law today. Section 145 of the Judicial Code; sec. 250, Title 28, U. S. C. It was the law when this contract was entered into. Can it be said that it was in the power of any officer or agent of the Government to set aside this Act of Congress and to say that the contracting officer, and not the Court of Claims, "shall hear and determine all claims founded upon [this] contract"? Such a provision is contrary to the law established by Congress and, therefore, is void.

Not only is it beyond the power of a party to bargain away this right given by Congress, but it must be borne in mind that bidders on this work were forced to enter into this sort of an agreement. The Government contends that as to this project this governmental agency said, the right given by Congress to sue in the Court of Claims is hereby taken away; an agrieved contractor can secure redress only by appealing to the contracting officer; he will decide whether or not we have paid you all we promised to pay.

This would be a shocking demand; Barlow et al. v. United States, 35 C. Cls. 514, 546; we do not believe the government intended to make it. We are of opinion that they intended to demand only that the contracting officer should decide
62 questions of fact arising as the work progressed, such as the proper interpretation of the requirements of the contract documents, the fitness of the materials, and the sufficiency and amount of the work, etc. Article 15, providing for decisions by the contracting officer, concludes, "In the meantime the contractor shall diligently proceed with the work as directed." This

clearly indicates they had in mind only those disputes that arose during the progress of the work. It negatives the idea that after the contractor had done all the work required of him, the contracting officer should decide whether or not he had been paid all he was entitled to.

We are of opinion the defendant is liable for increased wages paid by the plaintiffs in the amount of $4,660.83. On the whole case plaintiffs are entitled to recover the sum of $13,388.27. Judgment for this amount will be entered. It is so ordered.

WHALEY, *Chief Justice*, concurs.

Concurring opinion

MADDEN, *Judge*, concurring:

In my opinion, the case should be decided upon the ground that, whether or not the express provision of Article 19 was applicable, the Government, like any other contractor, impliedly agrees that it will not by its acts increase the cost of performance of the contract by the other party. We need not consider the effect of acts of the Government in its sovereign capacity, such as increasing taxes or setting wages or hours by laws of general application. Here the act complained of was the setting of wages on one specific job, which was the superstructure to be built on the foundation which the plaintiff had contracted to build.

The Government breached this term, which we read into the contract because it is fair and the parties to the contract must have intended it. Yet the Government urges that Article 15 of the contract gave the Contracting Officer the power to read this term out of the contract by deciding that the plaintiff was not entitled to a remedy for its breach. I think there are two objections to this argument.

(1) There is no indication that the Contracting Officer ever made a decision or gave any consideration to such a term
63 of the contract, or was aware that it contained any such term. This fact points to one of the difficulties that would be created by lodging in a contracting officer, nearly always a layman, the power to decide a question which cannot be decided without an understanding of the way in which the law has traditionally interpreted the texts of writings which appear in litigation. The consequence would be an interpretation which would stick in the letter of the contract and fail to reach its real meaning and equity. I think, therefore, that the Contracting Officer never decided the question which we are called upon to decide.

(2) I think that the parties never intended that the Contracting Officer should have the power to decide the question which we have before us, i. e., the question of whether or not the Government

breached its contract. In spite of the broad language of Article 15 of the contract, it must be that there are limits to its scope. In fact, the evidence in cases before us shows frequent examples of situations in which the Contracting Officer has disclaimed any power to decide that the contractor is entitled to compensation for unreasonable delay caused by acts of the Government. He knows that his decision would be substantially meaningless, since he could not award compensation, except by the expedient of covering it into some change or adjustment which he is authorized to make as the contracting agent for the Government. So he advises the contractor to seek relief from the Comptroller General first and, if he does not get it there, from this court. The Comptroller General, whose powers are somewhat undefined and whose expenditures are, so far as the Government is concerned, practically unreviewable, sometimes gives relief. If he does not, the contractor may come to this court, and the Government may not urge that his case is concluded by a decision made somewhere else, since the Contracting Officer made no decision at all, and the Comptroller General's decision does not, either by the contract or by law, foreclose resort to this court.

Since the Contracting Officer cannot make a decision, effective against the Government, that the Government has breached its contract, and since, if he did so, we would not be bound by it, he frequently does not decide the question at all if his decision
64 would be against the Government. This means that, in practice, the contractor, if he meant, by agreeing to Article 15, to lodge in the Contracting Officer the power to decide questions of breach of contract, has given that official power to decide cases against him, but no power to decide cases, effectively, in his favor. No contractor in his right mind would ever intend to do that. And no Government official, in drawing a contract, would intend to include in it such an unconscionable provision. And if both of them did, with their eyes open, intend any such agreement, we would feel bound to conclude that the law permitting Government agents to make contracts, and the statutes giving to a victim of the Government's breach of contract the right to sue in this court, do not authorize an agent of the Government to defeat that right by making such an unconscionable bargain about it. I therefore agree with the court that Article 15 was not intended to give to the Contracting Officer the power of decision which the Government claims for him, and that we are not foreclosed from deciding the case.

I recognize that, under Article 15 and other provisions of the standard Government contract, many matters of vital consequence to the contractor may be decided by the Contracting Officer without effective review by this court. The consequences are some-

times, in our opinion, harsh and unjust to the contractor. And the line between what the Supreme Court and this court have sanctioned in those cases, and what we refuse to sanction here may not always be easy to draw. But what the Government here urges, the power in the Contracting Officer to decide the ultimate question of whether his principal has breached its contract, should not be tolerated.

Opinion

LITTLETON, Judge, dissenting in part: I dissent as to the allowance of any part of the sum of $4,660.83 (finding 13) on account of increased wages.

In support of their claim for the recovery of these increased wages plaintiffs insist that section 12, Division 1, of the specifications and article 18 (a) of their contract (finding 5) fixed the wages that they were to pay under the contract and that, by article 19 (a), the Government agreed to reimburse them by adjustment of the contract price in the event the Administrator of Public Works established different wage rates. They further insist
65 that the Administrator did establish higher wage rates within the meaning of the provisions of the contract and specifications mentioned. I cannot agree. The wages specified in plaintiff's contract were minimum rates only. Article 19 (a) of the contract and paragraph 4 of section 12 of the specifications contemplated, I think, that the Government would increase plaintiff's contract price only in the event the Administrator established greater minimum wage rates under this contract and directed them to pay wages at such increased rates. The "project," referred to in art. 19 (a), was the foundation work and not the buildings which the Government might, under another contract, erect thereon. Each P. W. A. contract made was given a project number, and plaintiff's contract was "Project No. H-1405." The Administrator did not establish greater minimum wage rates under plaintiffs' contract nor on the "project" covered thereby, nor did he direct or otherwise directly force them to pay any increased wages. He did nothing except what he had a perfect legal right to do so far as plaintiffs' contract was concerned. Perhaps he should not have advertised for another contract at higher minimum wages, which would result in a higher bid price to the Government, until plaintiffs had finished their contract which was closely related to the new work, but this was not a breach of any express or necessarily implied provision of their contract and cannot be made the basis of a claim for reimbursement under art. 19 (a). Dravo Corporation v. United States, 93 C. Cls. 734. Moreover, section 12 of the specifications provided that the Government would not consider any claims for additional compensation because of payment by the

contractor of any wage rate in excess of the applicable rate contained therein, and that all disputes with labor in regard to payment of wages in excess of those specified "shall be adjusted by the contractor." This provision appears to have contemplated an event such as actually happened, i. e., a strike for higher wages.

The minimum wage rates set forth in plaintiff's contract were fixed by the Administrator of Public Works in the invitation for bids and specifications for the particular project covered by that contract under the Rules and Regulations approved by the
66 President December 26, 1934, issued under authority of section 203, Title II of the National Industrial Recovery Act, and Executive Order No. 6929, which Regulations, as far as material here, were as follows:

"Whereas, the President, by Executive Order No. 6829, of December 26, 1934, has delegated to the Federal Emergency Administrator of Public Works the power * * * to prescribe new rules and regulations * * * I hereby prescribe the following rules and regulations under the authority of the said section 209 as necessary to carry out the purposes of said Act, which rules and regulations shall apply to all projects constructed in whole or in part under Title II of said Act: * * *

"3. Wages: The wages paid to employees directly employed on any such project shall not be less than the applicable minimum wage rates which the Administrator may fix from time to time. Should it appear that any individual employed on any such project has been or is being paid less than the minimum wage fixed by the Administrator and in force at the time such labor was performed, the employer of such individual shall be notified to pay him all wages due according to the prescribed rate. Upon ten days' default on the part of any such employer after the receipt of such notice he shall be subject to the penalties provided in said Act for violation of these regulations."

The actual increased wages of $4,321, which plaintiffs incurred, were incurred and paid as a direct result of a demand and strike of their Union employees. Except for this, plaintiffs would not have been required by the Administrator, or otherwise, to pay any increased wages. Defendant did not request plaintiffs to increase the wages rates and no one representing the Government or the Administrator participated in the dispute between plaintiffs and the labor unions. The fact that the labor unions of the Chicago territory may have failed to abide by their wage agreement with the Building Trade Employers' Association, of which plaintiffs were members, cannot be made the basis of a claim for reimbursement against the Government. Nor can the Government be held liable to plaintiffs for reimbursement of the increased wages which they were compelled to pay under the circumstances, because the

Government on February 15, 1936, issued invitations for bids and specifications for another contract on another and a different project for the building to be constructed on the foundations
67 covered by plaintiff's contract in which minimum wage rates higher than those contained in plaintiffs' contract were specified. The provisions of plaintiffs' contract did not expressly cover such a situation, and the language used in art. 19 (a) and pargraph 12 of the specifications cannot be so extended as to include it by implication. Leslie L. LeVeque et al. v. United States, 96 C. Cls. 250. Hood & Gross 1. United States, 90 C. Cls. 258, 265. James I Barnes 1. United States, 92 C. Cls. 32, 43, 44. Cf. Blair v. United States,— U. S. —, April 10, 1944.

Art. 15 of the contract made the decisions of the contracting officer and the head of the department final on such questions. They both considered and rendered adverse decisions on the question whether the Administrator had established different wage rates in such a way as to require reimbursement to plaintiffs for the increased wages which they paid. This was clearly a "dispute concerning questions arising under this contract" and their decisions were final under the express agreement of the parties. These decisions were clearly not arbitrary, and they were clearly not so grossly erroneous as to imply bad faith. We cannot, therefore, ignore them. Ripley v. United States, 220 U. S. 491; 222 U. S. 144, 147; 223 U. S. 695, 696, 701, 702. Burchell v. Marsh, 14 How. 344, 349, 350.

Defendant makes the contention that plaintiffs did not appeal from the decision of the contracting officer to the head of the department. This contention appears to be based on the assumption that the Assistant Administrator was the contracting officer. Plaintiffs did appeal, and within time. Under the contract provisions the Director of Housing, A. R. Clas, was the contracting officer, as the Assistant Administrator stated in his decision of June 29, 1926. The Assistant Administrator of Public Works, Horatio B. Hackett, although he signed the contract, was the head of the department within the meaning of the contract as defined by article 28 (a). He was duly authorized to act for the Administrator and he did so act with reference to approval of change orders and consideration and decisions of appeals.

Plaintiffs make the alternative claim that even if their claim for reimbursement of the increased wages, as such, should be denied they should have judgment for at least $909 on account of
68 such wages (they claim the amount should be $1,856.08) under the findings and recommendations of the Assistant Administrator in his letters of June 29 and August 12, 1936, to plaintiffs and in the letter of the Administrator of May 20, 1937, to the Comptroller General (finding 18). These officials decided

in connection with plaintiffs' claim for extra costs that the expenses necessarily incurred by plaintiffs, including a portion of the increased wages, as a result of the stoppage and suspension of their work from December 10, 1936, to February 17, 1937, in connection with changes could not be allowed by them as an increase in the contract price as a part of an equitable adjustment under art. 3 of the contract in connection with the change order. This position appears to have been taken because of certain rulings of the Comptroller General. (See 7 Comp. Gen. 645; 12 Comp. Gen. 179, 227.) They therefore made findings with reference to the amounts and the cause of these expenses, and recommended to the Comptroller General that certain amounts be paid. While these findings and recommendations should be given great weight if the items covered thereby are found by the Court to be allowable, either under the contract or as damages for a breach thereof, they are not such decisions as are made final and conclusive by art. 15 for such purposes. The evidence of record does not warrant a finding by the Court that of the total increased wages paid by plaintiffs the amount of $1,556.06, or $909 thereof, was incurred as a result of the delay due to suspension of the work for 69 days in connection with the change under the contract as mentioned in the findings.

I think judgment should be entered in favor of plaintiffs for only $8,727.44.

JONES, Judge, took no part in the decision of this case.

69 *Judgment*

At a Court of Claims held in the City of Washington on the 5th day of June, A. D., 1944, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover $13,388.27.

It is therefore adjudged and ordered that plaintiffs recover of and from the United States the sum of thirteen thousand three hundred eighty-eight dollars and twenty-seven cents ($13,388.27).

70 [Clerk's Certificate to foregoing transcript omitted in printing.]

[Endorsement on cover.] Enter the Solicitor General. File No. 48884. Court of Claims. Term No. 431. The United States, petitioner, vs. Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, Trading as B-W Construction Co., not Inc. Petition for writ of certiorari and exhibit thereto. Filed September 5, 1944. Term No. 431 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

Supreme Court of the United States

Order allowing certiorari

Filed November 20, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.